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IN THE

Supreme Court of the United States

October Term, 1968

No. 589

JESUS ROLON MARXUACH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Jesus Rolon Marxuach, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered against him in the above entitled case on July 11, 1968.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on July 11, 1968. A rehearing thereon was denied on August 19, 1968.

Mr. Justice Abe Fortas on September 10, 1968, granted an order extending the time to file a petition for a writ of certiorari to and including October 1, 1960.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the First Circuit.

C. Question Presented

The question specifically raised by the petitioner, Jesus Rolon Marxuach, is:

1. Whether the petitioner was deprived of due process under the Fifth Amendment as well as his Sixth Amendment right to counsel of his choice?

D. The Statutes

The statutes involved are: United States Code, Title 21, Section 174; Title 26, Sections 4704(a) and 4705(a).

E. Summary Statement of Matters Involved

A three count indictment was returned against the petitioner and Miguel Soto Ayala, alleging the substantive violation of the aforesaid statutory provisions.

The petitioner was tried alone and found guilty as charged. He was thereafter sentenced to Twenty (20) years imprisonment, which he is now serving.

On appeal to the United States Court of Appeals for the First Circuit, the conviction of the petitioner was affirmed.

ONE

The petitioner was deprived counsel of his choice.

The instant deprivation of the right to counsel was threefold.

A.

The application for a continuance.

A defendant in a criminal prosecution has the right to be represented by counsel of his own selection and choice. *Johnson* v. *Zerbst,* 304 U.S. 458; *Glasser* v. *United States,* 315 U.S. 60. However, there is no dispute that the right to selection of counsel of one's choice may not be employed as a device or scheme or artifice to obstruct the even-handed administration of justice. *United States* v. *Bentvena,* 319 F. 2d 916 (2nd Cir. 1963). There is a reasonable limit as to the time allowed to a defendant to obtain his counsel. Once having obtained counsel of his choice, counsel may not unreasonably delay the trial because of other engagements, illness or incapacity. *Releford* v. *United States,* 288 F. 2d 298 (9th Cir. 1961).

Not to be overlooked are the further great truths flowing from the Sixth Amendment that a defendant has an unqualified right, if exercised at the appropriate time, to act as his own counsel and may reject counsel from being forced upon him. *Adams* v. *United States,* ex rel. McCann,

317 U.S. 269; *Minor* v. *United States,* 375 F. 2d 170 (8th Cir. 1967). Almost all these principles come into play in considering whether in a few short hours of trial, the petitioner was effectively denied due process under the Fifth Amendment to the United States Constitution as well as the right to counsel under the Sixth Amendment thereof.

The relationship between Court and counsel is not adversarial, even though there may be less than parallel objectives on the part of each. Counsel is an advocate for the defense, and the Court is an impartial legal arbiter.

Primarily, these definitions are not apposite when a mainland Judge is sent to Puerto Rico with the mission of clearing calendars. His concern, then, in moving cases for trial or disposition is overlaid by the knowledge of a stern review of his productive, administrative ability in accomplishing movement on the calendar. Judge Boldt, the Trial Judge here, obviously a man of inexhaustible energy, worked better than twelve hours a day in the Court room itself in discharging this administratively-conceived task. His strength, however, was not the strength of all who participated in this case.

On October 3, 1967, all parties appeared in Court at 9:15 a.m. (TR 2).[1] A panel of prospective jurors was available and present. The defense had earlier filed a Motion for Continuance which the Judge chose to hear in chambers. This motion for a continuance was predicated upon the illness of the co-defendant, Soto-Ayala who had been hospitalized. The Court severed Soto-Ayala and ordered the petitioner's trial to proceed. At this time and in chambers, the Government informed the Trial Court that an explosive device had allegedly been attached to the car of one of the two principal witnesses for the Government.

[1] TR refers to the transcript of the trial of the petitioner Jesus Rolon Marxuach.

The apparent friction which had been generating tenseness between defense counsel and the Court caused an explosion of its own in chambers. The Court had just castigated counsel for "a continuous series of applications for continuance" (TR 5) and said that "I do not propose to accept any statement made by or on behalf of the Defendants or their counsel which are not substantiated by sworn testimony of affidavit." (TR 6). In another case, counsel had been threatened with disbarment and contempt by Judge Boldt. See *United States* v. *Goitia,* Tr. T. 27 October 2, 1967, Cr. 59-67, USDC P. R. Defense counsel were obviously nursing what they considered to be assaults upon their personal integrity while the Assistant United States Attorney described the exceedingly serious development of the alleged discovery of an apparent threat to the life of a witness. In this context, defense counsel was asked by the Court if he had "any knowledge of these matters." (TR 10). The query was nought but fantastic. The concomitant reaction was of gasping disbelief and an aggravation of a pre-existing cardiac condition of Benicio Sanchez Castano, the petitioner's trial counsel. It was incredible that the Court could think that he would either participate or have knowledge of such participation.[2]

The Court thereupon, compounding the insult sought to explain its question by asserting that its intention was not one of personal accusation. To this, response was made, as only it could, by the query "How could we have knowledge of these things, Your Honor, without being in the conspiracy?" (TR 15).

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[2] The Court of Appeals held that Judge Boldt's "perhaps unfortunately phrased question doubtless sprung from its understandable disturbance over the bombing incident." Page 3 of the slip opinion. However, it might not be amiss to note that respect and loyalty are reciprocal.

Mr. Sanchez left the Court for examination by his physician, an outstanding cardiologist, and the Court proceeded to conduct a hearing in his absence on the Government's motion to revoke the petitioner's bail. The record does not indicate that the petitioner was advised of his counsel's illness, probable incapacity or probable incapability to represent him further. Later in the morning, the Court stated that it would empanel a jury at 2:30 in the afternoon, with no concern as to whether Mr. Sanchez would be present or not. (TR 69-70). At five minutes to one on the same day, there was delivered to the Court a sworn certificate by Dr. Arrillago Torrens which indicated the incapacity of Mr. Sanchez. Mr. Andreu, who had been forbidden to leave, pointed out to the Court that Mr. Sanchez was the attorney retained by the petitioner to try this case. (TR 72). The Trial Court however reiterated its prior determination that Mr. Andreu was to conduct the trial and the application for continuance based upon the sudden illness of Mr. Sanchez was denied. (TR 77).

The foregoing transpired out of the presence of the petitioner who was neither consulted by the Court as to choice or selection of counsel, nor inquiry made of his relationship with counsel until the trial was underway. Then, what colloquy did occur, did so only at the insistence of the petitioner.

In the chronology of events, at 2:55 P.M. the trial began. During the course of the empanelling of the jury, the petitioner, so far as the record reflects, was initially advised that the trial would proceed and was proceeding in the absence of his chosen and retained trial counsel, Mr. Sanchez. The petitioner through Mr. Andreu, then asked to address the Court and permission was refused. (TR 92). Subsequently, Mr. Andreu again informed the Court that the petitioner insisted upon addressing the Court and again

permission was denied. The Court allowed Mr. Andreu to come to the bench and out of the hearing of the jury, Mr. Andreu advised the Court that the petitioner ". . . insists that I am not his attorney. Now, Mr. Sanchez was retained by me, and that I represented only Mr. Miguel Soto, that I am not authorized by him to carry on with any questions. So, I don't know what to do. If it do it . . ." (TR 109-110). The Court chose to disregard the grave considerations including the obvious conflict of interest existent between the defendants.

The jury was very quickly empanelled and the Court ordered that opening statements be made. At that moment, Mr. Andreu again sought permission to address the Court and the following took place at the side bar out of the hearing of the jury:

> "You have forced me to proceed to empanel a jury even though the defendant has informed you through me that he does not want me to represent him in this case because his case was to be handled by Mr. Benicio Sanchez Castano, who became ill this morning in chambers while you carried on an investigation. As a consequence of certain comments or questions that you propounded to the defendants, the defendant, before you empanelled the jury, communicated through me to you that he wanted to address you. Right now you are proceeding without hearing the defendant, and you are proceeding to try him and even indicated that you would like to have the District Attorney make his presentation of the opening statement to the jury. Your Honor, as an officer of the Court I think that Mr. Rolon-Marxuach, no matter what his reputation is, should not be tried in this way. He should be given a fair opportunity of having the counsel of his selection, Mr. Sanchez Castano, to participate in his trial. (TR 124-125)

Proceedings then continued before the jury in open Court and in the presence of the petitioner. The Court had given permission for the jury to leave until the following morning when the petitioner, again asked the Court for permission to speak, and the following colloquy occurred:

> The Defendant: May it please your Honor, I would like to make a statement to the Court.
>
> The Court: Please be seated, Mr. Marxuach.
>
> The Defendant: I want to have the opportunity to make a statement to you.
>
> Mr. Andreu: Your Honor, excuse me, the defendant has repeatedly asked your Honor, he wants to address the Court.
>
> The Court: I am going to allow him to do that as soon as we recess, then he can address the Court at that time. But I want to let the jurors get on their way home tonight.
>
> The Defendant: He doesn't represent me, Your Honor.
>
> The Court: Mr. Rolon, if you do not take your position and conform to the directions of the Court, the Court will have to take some action.
>
> The Defendant: I am compelled to go to trial without any attorney. (TR 128-129)

The jury was excused. The petitioner, for the first time, was permitted by the Court to state that he had retained Benicio Sanchez Castano as his trial attorney (TR 131). He stated that Mr. Andreu was acting as the attorney for his co-defendant, Soto-Ayala (TR 152). The protestations of the petitioner were not acted upon by the Court.

Thereafter, Mr. Andreu again raised the propriety of his representing the petitioner. The Court apparently in

an effort to foreclose any further discussion about this matter, inquired as to whether Mr. Andreu had been paid by the petitioner. Upon being advised by Mr. Andreu that he had not, but that to the contrary Mr. Sanchez Castano had been paid, the Court appointed Mr. Andreu as counsel for the petitioner and directed him "to proceed diligently with all that may be required to get this case tried." (TR 167).

It is submitted that the Trial Court did in fact abuse its discretion in not granting a continuance to the petitioner. Indeed it denied him due process by compelling him to proceed to trial without retained trial counsel of his choice.

There was no thorough and complete inquiry by the Trial Court as to the retainer agreement with Mr. Sanchez Castano. The Court contented itself with a few questions as to what the record appeared to reflect. The Court did not consider the protestations of Mr. Andreu nor indeed the statements of the petitioner.

The relationship between the attorney and client is personal and intimate. Here Mr. Andreu specifically and unequivocally informed the Court that Mr. Castano was the petitioner's retained trial attorney. Moreover that he, Mr. Andreu represented a severed co-defendant, Soto-Ayala. The request for a continuance was not unreasonable under the circumstances of Mr. Sanchez's illness. This unfortunate occurrence was in no way attributable to the petitioner nor can he in any way be charged with responsibility thereto.

The petitioner did not then contend that there should have been a lengthy continuance. *Releford* v. *United States, supra.* His plea and his request was that he was not being represented by his counsel and he wanted counsel of his own choosing.

The Court in its haste to try this case did not consider, or, if it did consider, ignored the legal implications of assigning Mr. Andreu to represent the petitioner. For if the Court made inquiry as to the relationship between Mr. Sanchez Castano and the petitioner, vis-a-vis that between the petitioner and Mr. Andreu, it would have realized the validity of his claim. Mr. Sanchez Castano became in actuality the lawyer for the petitioner at the time that bail was set. The record discloses that this bail was fixed at the time of his arrest. Indeed Mr. Sanchez Castano appeared as counsel for the petitioner at a time almost coincidental with the alleged appearance of Mr. Andreu. The mere circumstance as to whose name appeared first and in whose office a motion was prepared is not of any binding significance in the determination of the relationship. What is significant is what the parties consider it to be.

There is nothing unusual for two counsel appearing for co-defendants to utilize their office facilities in a manner which is most efficient for them. The question of competency or prejudice was specifically found to be nonexistent in *Releford.* The attorney who tried the case apparently represented Releford more than adequately and "no actual prejudice was shown with respect to his participation in the trial as counsel for Releford." *Releford* v. *United States, supra,* page 302.

The distinction without a difference referred to above is that concededly there had been some attorney-client relationship between Mr. Andreu and the petitioner. The record supports the petitioner's contentions that the attorney-client relationship did not include representation at this trial. Therefore, Mr. Andreu was, at most, in essence equivalent to the office associate in *Releford.* Applying *Releford* to this case, the conclusion is inescapable that "there have been complete disregard of the defendant's

right to choose his own counsel," and therefore "prejudice will be assumed." *Releford* v. *United States, supra,* page 302.

The Court should have granted the motion for a continuance *sua sponte.*

There would have been little if any impediment to the administration of criminal justice if this case had been adjourned for a week. For then the petitioner being advised that in the event Mr. Sanchez was unavailable to try this case within that time, he was obliged to appear with counsel of his choice or run the risk of being considered to have waived counsel. This procedure would have been in accord with the accepted constitutional standards under the Sixth Amendment. *Releford* v. *United States, supra,* Cf. *Bentvena* v. *United States, supra.* A continuance would have averted the problems apparent in this case. The Government had other cases to try involving the same witnesses and it tried cases subsequent to this one involving the same witnesses. A week's adjournment or continuance because of the illness of a distinguished member of the bar of the District of Puerto Rico was not an extreme request. Its denial, was an abuse of discretion on the part of the Trial Court. This continuance should have been granted.

Releford v. *United States, supra,* should be controlling as to the facts and circumstances of this case. True, certain distinctions may be noted in the factual pattern as between the two cases, but it is respectfully suggested that they are insubstantial. In *Releford,* the defendant had retained an attorney who became ill shortly before the trial date. On the trial date, an attorney who shared the offices of the retained counsel appeared in Court on behalf of the defendant and sought a continuance. The continuance was denied and the defendant was forced on to trial with the associate of his retained attorney. There

was no expressed rejection of this new counsel by the defendant but instead he stated a preference for the attorney whom he had retained. The Court of Appeals for the Ninth Circuit, in unanimously reversing, held that the Defendant had been denied the right to counsel of his own choice and stated:

> "... A person charged with crime in a federal court is entitled under the Sixth Amendment to the assistance of counsel for his defense. Johnson v. Zerbst, 304 U.S. 458, 463, 58 S. Ct. 1019, 82 L. Ed. 1461. Where such a person is able to obtain counsel for himself and does not ask the court to appoint counsel, he must be given a reasonable time and a fair opportunity to secure counsel of his own choice." *Releford* v. *United States, supra,* page 301.

B.

There was a conflict of interests and Mr. Andreu should not have been assigned to represent the petitioner.

Mr. Andreu represented the severed co-defendant, Soto-Ayala. That fact alone should have been sufficient to preclude his assignment as counsel for the petitioner.

Beginning with *Glasser* v. *United States, supra,* there has been a growing awareness of the danger involved in one lawyer representing more than one defendant in a criminal prosecution. Of course, there are cases in which representation by counsel of two or more defendants does not derogate the right to counsel as to any defendant. However, the Courts have scrutinized each situation to determine whether, as here, the Sixth Amendment has been violated.

In *Glasser* v. *United States, supra,* there was a infringement upon the right to counsel by a non-conflicting joint

representation of retained counsel of an indigent defendant without the consent of the retained client. While in this case, we can show the prejudice that accrued to the petitioner, we respectfully submit, that such is unnecessary. The Supreme Court has held that:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial . . . Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the Court." *Glasser* v. *United States, supra,* page 76.

There can be no serious argument raised in opposition to the petitioner's right to be represented by an attorney devoted solely to his interests. *McKenna* v. *Ellis,* 280 F. 2d 592 (5th Cir. 1960). To protect this singular devotion to one in the same position as the petitioner, the Court of Appeals for the District of Columbia Circuit has imposed a fact-finding burden upon the Trial Court. *Lollar* v. *United States,* 376 F. 2d 243 (D.C. Cir. 1967). The Court found this duty as a virtual command of the Supreme Court in *Johnson* v. *Zerbst, supra,* at page 465:

> "This protecting duty imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be

fitting and appropriate for that determination to appear upon the record."

The petitioner was denied this minimum standard of protection by the Trial Court.

> "Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney . . ." *Campbell* v. *United States,* 352 F. 2d 359, 360 (1965)

There should have been no affirmative determination because the petitioner, rather than be represented by the same counsel as his co-defendant with conflicting interests, specifically disclaimed any representation by Mr. Andreu.

Whether Mr. Andreu was assigned by the Court or had been retained by the petitioner, the same infirmities were present. As the Court said in *Lollar:*

> "Certainly, whatever risks and disabilities inhere in joint representation inhere whether counsel is appointed or retained; and whatever steps a defendant is entitled to take to avoid such problems should be made known to him whatever his economic situation may be. Therefore, since nothing in the record indicates that appellant was so advised, he of course cannot be said to have waived rights of which he was unaware." *Lollar* v. *United States, supra,* page 246.

If Lollar is controlling, then the representation of the petitioner by Mr. Andreu is clearly in violation of his Sixth Amendment right. The failure of the Court to inquire into the possibly highly-prejudicial situation which arose from the joint representation by counsel was and is error.

The prejudice apparent from the joint representation stands out in bold relief. Mr. Andreu represented the co-defendant Soto-Ayala whose defense was that the transaction which formed the basis of the Indictment had never occurred. However in so contending, he admitted that he did in fact meet with a Government informer at about the times and places charged. The defense underlying the apparent trial strategy, if such may have been said to have existed, was that the petitioner was not present and that the Agents who allegedly saw the transaction were not telling the truth beyond a reasonable doubt in describing their observations. As the defendant Soto-Ayala had been severed he could take the witness stand and testify in his own behalf without running the risk of his own testimony incriminating him in the sense of having the jury find him guilty. If his testimony were to be accepted by the jury, then of course, it would be highly questionable as to whether the Government would press its case as against him. If, on the other hand, the jury found the petitioner guilty, it might be propitious for the witness Soto-Ayala to seek to work out his compromise plea rather than face conviction under the mandatory five-year minimum imprisonment section of the Indictment. Soto-Ayala's testimony corroborated material aspects of the Government's case. The movements and presence of the witness Soto-Ayala and of the informer were corroborated by the co-defendant Soto-Ayala. The jury then found itself confronted with support and substantiation of the Government's case from the mouth of a petitioner's witness. The conflict of interest is obvious.

The degree of prejudice suffered by the petitioner can in no way be construed beyond a reasonable doubt to have been harmless error. *Chapman* v. *California,* 386 U.S. 18 (1967).

The example given above in describing the possible motives incorporated in the testimony of Soto-Ayala and the effect thereof creates much more than a reasonable doubt. The dire predictions stated above came to pass as Soto-Ayala subsequently took advantage of the situation by pleading not guilty to the Internal Revenue violation contained within the Indictment and was sentenced to two years under the less onerous provisions of that statute.

There was no duty upon the Trial Court to assign counsel to the petitioner. But there was a duty upon the Trial Court to see that the petitioner was represented by retained counsel of his choice and receive the full and undivided services of that counsel. The improvident situation which the Court created as to representation of the petitioner, was not of the petitioner's doing nor should he be held accountable thereto. For it stands constant that Mr. Sanchéz was retained by the petitioner to represent him at trial. That Mr. Sanchez became ill, in no small measure because of the callous conduct of the Trial Court. The petitioner was thereupon counselled to proceed to trial without Mr. Sanchez at his side.

C.

Appellant did not have effective counsel.

The Trial Court refused to accept the self-deprecatory assessment of Mr. Andreu as to his qualifications to try a Federal criminal case, i.e. his lack of knowledge as to the Federal Rules of Criminal Procedure, his unfamiliarity with federal practice and his difficulties with the English language.

Mr. Andreu totally ignored or was unaware of the highly-beneficial provisions of Section 3500 of Title 18. We do not know what benefits may have been derived from a cross-

examination keyed to reports made by the officers who testified in this case. In fact, we do not know whether reports had been made. Indeed, we do not even know whether reports had been made and wilfully destroyed so that the punitive provisions of Section 3500 of Title 18 might have been employed in order to strike their testimony.

There was no motion made for the production of the Grand Jury testimony, if such did exist, of the testifying Agents.

At the close of the Government's case, there was no motion made pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. There was no motion made at the close of the entire case under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. There was no motion made pursuant to Rule 29 and Rule 33 of the Federal Rules of Criminal Procedure after the jury had returned its verdict. Nor was time reserved to make such motions in the event that sentence date was more than seven days after the return of the jury's verdict. Mr. Andreu unquestionably was candid when he advised the Court that he had no familiarity with the Federal Rules of Criminal Procedure. Judge Boldt, at this point, stated that he would help Mr. Andreu and certainly that a lawyer of so many years experience would have no difficulty with the trial of a Federal case. The colloquy between the Court and Mr. Andreu is as follows:

> "I wish to state, Your Honor, that Mr. Sanchez, as he told you this morning and as the records of this Court shows, is the person that was retained by Mr. Rolon-Marxuach to carry on with the empanelling of the jury as I do not practice in this court, Your Honor. The last time I practiced here was many years ago, and I have also my inconvenience with the language.

The Court: You speak every bit as well as he does, of course. As a matter of fact, I understand you much better than I do Mr. Sanchez.

Mr. Andreu: I thank you again for that, Your Honor.

The Court: I mean that most genuinely.

Mr. Andreu: I do not know the Federal Rules of Criminal Procedure. I may come to a point in which I will be embarrassed, and that is why I retained Mr. Sanchez.

The Court: I don't think there need be any difficulty in that respect, Mr. Andreu. Anything that you wish to know, I will be glad to inform you. (TR 72-73)

Needless to say, the record discloses neither exchange of information nor assistance, though both were sorely needed. In any event the combined efforts of Court and Counsel are not a fair substitute for counsel, selected and retained by petitioner.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

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